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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/782,794

02/23/2004

Mark Roland Boeder

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STEPTOE & JOHNSON LLP
1330 CONNECTICUT AVENUE, N.W.
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EXAMINER

HWU, JUNE

ART UNIT

PAPER NUMBER

1661

MAIL DATE

DELIVERY MODE

10/31/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No.	Applicant(s)	
	10/782,794	BOEDER, MARK ROLAND	
	Examiner	Art Unit	
	June Hwu	1661	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 October 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 03 October 2007. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: _____.

Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

KENT BELL
PRIMARY EXAMINER

Kent L. Bell

Continuation of 11. does NOT place the application in condition for allowance because: Claim 1 remains rejected under 35 U.S.C. 102(b) as being anticipated by the European Plant Breeder's Right (PBR) application number 011850 published on February 15, 2002, more than one year prior to the filing date of the instant application in view of Applicant's admission that the instant cultivar was first sold in August 2002 at a flower auction in the Netherlands (reply dated January 24, 2005, page 3 and reply dated October 5, 2005, page 1) and the Royal Horticultural Society (RHS) Dictionary of Gardening 1992, vol. 1 describing how to asexually propagate a chrysanthemum plant. Applicant argues that the information in the PBR application does not disclose any information relative to the CBA contact information nor availability of the instant plant. This is not found persuasive the name of the breeder is listed at least in the UPOVROM reference dated 12/17/04 and with that information a person of ordinary skill in the art could have search the Internet for "C.B.A. Research B.V." The CBA website lists the contact information and a person of ordinary skill in the art could have contacted CBA and check the availability of the instant plant. Applicant argues that the accessibility under USC 102(b) should be in the U.S. This argument is not found persuasive because in *Elsner* the Court remanded the cases for further information relative to the "accessibility of the foreign sales" and does not state that the accessibility should be in the U.S. only. Applicant argues that there is no evidence of record that the sales in the Netherlands more than one year prior to the filing date of this instant application could have resulted in possession in the U.S. of the plant to practice asexual reproduction. This argument is not found persuasive because the basis of the 102b rejection is the published PBR application more than one year before the filing date of this application and the admitted sale of the instant cultivar by the applicant wherein the public was in possession of the instant plant more than one year before the filing date of the instant application and the RHS reference describing how to reproduce a chrysanthemum. Applicant argues that the published PBR application is not enable because the public was not in possession of the plant. This argument is not found persuasive because as stated above the published PBR Application is enabled because the instant plant was available to the public as early as 2002 in the Netherlands. Applicant argues that the instant plant was not sold or imported to the U.S. and therefore not in public sale or use under 35 USC 102(b). This argument is not found persuasive because the rejection is based on the fact that the instant cultivar was "described in a printed publication in this or a foreign country". Applicant argues that no single cited reference is enabled. This argument is not found persuasive because the admitted sale of the instant plant anywhere in the world enables the printed PBR document. Applicant argues that the sale of the instant plant must occur in the U.S. This argument is not found persuasive because as stated above the rejection is the printed publication, admitted sale of the instant plant and the reproducibility of the instant plant.

KENT BELL
PRIMARY EXAMINER

Kent Bell